

MUNAH BINTI HAJI BADAR v. ISAM BINTI
MOHAMED SYED & ANOR.

[O.C.J. (Burton Ag. C.J.) November 1, 1935]

[Malacca Originating Motion No. 17 of 1935]

Ordinance No. 39 (Malacca Lands Customary Rights) —
Naning Custom.

In the case of land held by the *Naning* Custom, if *Pesaka* land of a *suku* is registered in the name of some person not of the tribe there remains a right vested in the tribe to redeem the land. The owner of the land merely has an interest in the land defeasible upon a *waris* of the *suku* performing the condition of payment of the sum of money paid by the owner for the land. Until such condition is performed the owner of the land has the right to take the profits of the land but he has no further claim to interest on the price paid by him.

ORIGINATING MOTION.

In this case a claim was made to land held under Ordinance No. 39 (Malacca Lands Customary Rights) that the name of one Munah binte Haji Badar should be expunged from the Mukim Register as the registered owner of E.M.R. Serial No. 274 Ramuan China Kechil, Malacca. The District Officer, Alor Gajah acting as Collector under section 13 of that Ordinance made an order refusing to expunge the name of Munah binte Haji Badar from the Mukim Register. From this order Isam binte Mohamed Syed and Alang binti Lebar appealed to the Resident Councillor, Malacca, under section 14 of the Ordinance. The Resident Councillor heard the appeal; he took further evidence and the hearing before him was in the nature of a rehearing. The land in question was admittedly *Pesaka* land belonging to the Suku Tiga Nenek or Tiga Batu Rembau. One Sudah binti Midin charged the land to a Chettiar. The money was not repaid and the land was auctioned in July, 1924 and sold to a Malacca man named Haji Ahmad bin Haji Puteh. As Haji Ahmad bin Haji Puteh was not a member of the Suku Tiga Nenek tribe it was arranged between him and Haji Salleh bin Tahar that Haji Salleh bin Tahar (a member of the tribe) should take over the land for the price that Haji Ahmad bin Haji Puteh had paid for it at the auction. The land was put in the name of Munah binti Haji Badar, the wife of Salleh bin Tahar but Munah was a member of the Suku Anak Malaka Kampong Bukit and was therefore not qualified to hold the land. The land had considerably increased in value since the purchase. Evidence was given by several witnesses that the *Naning* Custom lays down that if a Malay *waris* acquires *Pesaka* land he is bound to surrender it to a female of the *suku* if she pays him the money he paid for the land.

The judgment of Bryant, Resident Councillor, was as follows:

Bryant R.C.: The claim in this case is by Isam binti Mohd. Syed and Alang binti Lebar, as descendants of Sudah binti Midin of the Suku Tiga Nenek, also known as the Suka Tiga Batu Rembau, for the return of the land comprised in S.R. No. 274 Ramuan China Kechil, by Haji Salleh bin Tehar for the price of \$60 — which he paid for the land in 1934.

The facts in the following paragraphs are undisputed by either party.

The land in question is *Pesaka* land, originally registered in the name of Sudah binti Midin. It was seized for a debt due on a promissory note to a chetty, and sold by public auction in July 1924, to a Malacca man, named Haji Ahmad bin Haji Puteh. The Collector of Land Revenue at the time, Mr. Curtis, discovered on the day of the auction that the land was in actual fact *Pesaka*, and instructed Penghulu Harun bin Talib to obtain a purchaser in the Tiga Nenek tribe in order to recover the land from the Malacca man for the price which the latter had paid at the auction. No female member of the tribe came forward with the money required and it was, therefore, arranged that a male member of the tribe Haji Salleh bin Tahar should take over the land and pay the purchase price to the Malacca man. The name of Haji Salleh's wife, Munah binti Haji Badar, of the Suku Anak [43] Malacca Kampong Bukit, was then permitted to be entered in the Register. The District Officer, however, added the words "*Pesaka* Tiga Nenek" to show that the land still remained with the original *suku* in spite of the intervening transactions.

Haji Salleh bin Tahar is willing to return the land to the claimants but for its present value which he estimated at \$400. The claimants, however, considered that they should only pay \$65.50, namely, the \$60 originally paid by Haji Salleh bin Tahar for the land, and \$5.50 being the rent on the land for the eleven years for which it has been in the possession of Haji Salleh. The only issue in this case is, therefore, the price which should be paid by Isam binti Mohd. Syed and Alang binti Lebar for the return of the land to them.

The evidence of Penghulu Harun bin Talib is important as he has personal knowledge of the transactions which took place in July, 1924. He stated that Mr. Curtis informed him that Haji Salleh bin Tahar should return the land to the descendants of Sudah binti Midin when the latter claimed it, and were able to repay Haji Salleh, but that, Mr. Curtis said nothing about the price for which the return of the land should be made. Haji Salleh avers that he acquired the land as a *bona fide* purchaser for value and that he is now entitled to be paid the present value of the land before he surrenders it to the claimants. He wants \$400 for it. The claimants on the other hand, contend that he only acquired as a trustee for the descendants of Sudah binti Midin in order to keep the land in the Suku Tiga Nenek. The witness, Mohamed bin Idris stated that the *Naning* custom lays down that if a Malay *waris* acquires *Pesaka* land he is bound to surrender it to a female of the *suku* if she pays the money he paid for the land. I can, however, find no verification of this statement. Similar cases of the kind have occurred in the past, where a male member of a tribe which follows matriarchal ownership has been allowed a life interest in a land, and I have no doubt that this was the intention of the District Officer allowing repurchase by the female line.

There is no evidence that Haji Salleh bin Tahar agreed in 1924 when he acquired the land to return it to the descendants of the Suku Tiga Nenek for the price of \$60 only which he gave for it. He stated that

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he is able to find a purchaser in the Suku Tiga Nenek for the price of \$400 he now asks and is willing to convey the land to the claimants for this price.

Having regard to all the circumstances and available evidence in regard to the matter of price, I have come to the conclusion that Haji Salleh bin Tahar acquired the land in 1924 as a purchaser for value but on the understanding that the land could not be sold outside the Suku Tiga Nenek. The land has acquired an enhanced value owing to its having become included in the village, and, in my opinion, Haji Salleh bin Tahar is entitled to the present value of the land as the consideration for his parting with it whether to the claimants or to any other female member of the Suku Tiga Nenek. I accordingly dismiss the appeal against the order of the Collector of Land Revenue of Alor Gajah. The order states that the land should continue as Tanah Pesaka Tiga Nenek and that Haji Salleh bin Tahar and Munah binti Haji Badar may not therefore sell the land outside the *suku*. The purchase price is, however, a matter for the *waris* and Munah to decide and must be agreed upon. Should Munah binti Haji Badar die before the land is redeemed by the *waris*, the land will revert to the Suku Tiga Nenek on payment of the Land Office valuation of the land to Munah binti Haji Badar's heir.

Order accordingly.

Thereupon the appellants moved the High Court for an order that the order made by the Resident Councillor be set aside.

The motion came on for hearing at the Malacca Assizes.

W. F. Zehnder for the appellants, Isam binte Mohamed Syed & another.

The respondent, Munah binte Haji Badar appeared in person.

Cur. Adv. Vult.

Burton Ag. C.J.: This is an appeal from a decision of the Resident Councillor, Malacca, affirming a decision of the Collector of Land Revenue, Jasin.

Isam binte Mohamed Syed and Alang binte Lebar claim from Munah binte Haji Badar a piece of land which is admittedly *Pesaka* land of the Suku Tiga Nenek. It was originally registered in the name of Sudah binte Mydin, a member of that tribe, who charged it to a Chetty and defaulted. The land was put up at auction on 10th July, 1924 and knocked down to a Malacca man named Haji Ahmad bin Haji Puteh, a nominee of the Chetty and a stranger to the Suku Tiga Nenek. The bid was apparently accepted by an oversight; but the mistake was discovered the same day, and Mr. Curtis, the District Officer instructed the Penghulu to obtain a purchaser in the Tiga Nenek tribe. The Penghulu could not find any female member of the tribe who would buy, and an arrangement was made by which Haji Salleh, the Ibu Bapa of the Tiga Nenek tribe, paid the purchase price to Haji Ahmad. Haji Salleh, however, being a male, could not be registered as owner of the *Pesaka* land, and the District Officer arranged that Haji Salleh's wife, Munah binte Haji Badar, should be registered as

owner of the land. But this seems also to have been wrong because she, as the wife of Haji Salleh, was of course not a member of the Tiga Nenek tribe; she belonged to the Suku Anak Malaka. The District Officer [44] must have realised this, because in order to prevent any claim to the land by the Suku Anak Malacca he added on the title the words "*Pesaka Tiga Nenek*."

The land is now claimed by the grand-daughter of Sudah, Isam binte Mohamed Said and her aunt, Alang binte Lebar. They claim as members of the Suku Tiga Nenek. Sudah is willing to give the land back to the Suku Tiga Nenek but claims to be paid as compensation the present value of the land, which is estimated to be about \$400. The claimants say they ought to have it for \$60 the actual sum paid by Haji Salleh to Haji Ahmad together with \$5.50 the quit-rent during the intervening period. The value of the land has been enhanced in the meanwhile because a small village has sprung up in the neighbourhood and some houses have been built by Chinese on it.

The whole dispute then turns on the question what is the legal position of Haji Salleh. The facts are not in dispute. Mr. Zehnder argues that he was a trustee for the Suku Tiga Nenek, and that the proper order is that the land should be transferred to the appellants upon re-payment of the \$60 together with the \$5.50 for quit-rent and interest. Haji Salleh's case appears to be that he acquired the land as a *bona fide* purchaser for value, and the Resident Councillor has so found:

"Having regard to all the circumstances and available evidence in regard to the matter of price, I have come to the conclusion that Haji Salleh bin Tahar acquired the land in 1924 for \$60 as a purchaser for value, but on the understanding that the land could not be sold outside the Suku Tiga Nenek."

But this finding seems hardly consistent with what he had written just before:

"Similar cases of the kind have occurred in the past where a male member of a tribe which follows matriarchal ownership has been allowed a life interest in land, and I have no doubt that this was the intention of the District Officer." But I doubt if either view of the position is correct. Nor do I think that Haji Salleh was a trustee. As I understand the evidence he was never put under any duty to account for profits.

It is clear that Haji Salleh has been in possession of the land, which is registered in the name of his nominee, Munah. He had further, it would seem, the right to take the profits. But the indorsement on the title by the District Officer of the words "*Pesaka Tiga Nenek*" means that there remained a right vested in the tribe to redeem the land. The evidence of the Penghulu bears this out. He says:—

"Mr. Curtis later told me that Haji Salleh could have the land until a *waris* was available who could pay the price of the land."

It follows that Haji Salleh has an interest in this land which is defeasible upon a *waris* of the Suku Tiga Nenek performing the condition of payment of the sum of \$60. The position seems to be practically that of a mortgage. Consequently the appellants are now entitled to redeem on repayment of the sum of \$60 and the quit-rent \$5.50.

Whether or not this sum of \$60 should bear interest is not easy to decide. It is clear on the evidence

that there was no specific covenant for interest. On the other hand Haji Salleh took the profits of the land. By English law interest is payable upon mortgage debts even though it is not expressly reserved, unless there is either an express or implied stipulation to the contrary. Here there is no deed, but I think that the right of Haji Salleh to take the profits would negative any claim to interest. And the circumstances of the transaction seem to me to indicate that no interest is payable; this is supported, if what Mr. Zehnder says is correct, by the reluctance of *Naning Malays* to stipulate for interest as being forbidden by Mohammedan law.

I think therefore that the order of the Resident Councillor should be varied, and that the land should be transferred to Isam binte Mohamed Syed and Alang binte Lebar as tenants in common upon payment by them to Haji Salleh of the sum of \$65.50. No costs are asked for, and I make no order as to costs.

Order varied accordingly.

Solicitors: *Zehnder Brothers.*

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F.M.S. REPORTS

In Re LEONG AH HENG OFFICIAL ASSIGNEE v. HO CHOO

[O.C.J. (Howes J.) September 19, 1935]

[Perak Bankruptcy No. 19 of 1935]

Bankruptcy Enactment, 1912, s.46(i) — Fraudulent preference — "With a view to giving a preference" — Dominant motive of transferor being to do what he is bound or compelled to do.

Whether a transfer of property is made in favour of a creditor with a view to giving such creditor a preference over other creditors is one of fact. The question to be determined is whether the dominant motive actuating the debtor in making the transfer is a desire to prefer the particular creditor or was it of a different character? As a solution of this question involves an inquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence.

Where the dominant motive actuating the debtor was that in making the transfer, he was only doing what he felt himself bound or compelled to do, the transfer is not void as against the Official Assignee.

Sime, Darby & Co. Ltd. v. Official Assignee, A.I.R. 1928 P.C. 77 followed.

Lewis for the applicant.

Coomarasamy for the respondent.

Cur. Adv. Vult.

The facts appear sufficiently from the judgment.

Howes J.: On 15th January, 1934, the bankrupt who was carrying on the business of a cycle dealer in Ipoh under the name of Hock Leong Hin Tong Kee, wrote to the respondent, Hoo Choo as follows:—

"As I have settled account with you for the sum of \$5,000 for which I have given you an I.O.U. for \$5,000 of

A even date, I hereby authorise you to remove from my shop, Hock Leong Hin Tong Kee at any time, goods to the value of \$7,500 as collateral security without let or hindrance."

B The bankrupt had been borrowing money from the respondent since 1928, and the above document was given to show the position of affairs between her and the respondent on 15th January, 1934. The bankrupt admitted that she used some of the money in paying off previous loans from other people, in the expenses of her daughters' marriages, and for domestic expenses. A little of it was used in her cycle business, but no entry as regards this was made in her books of the business.

C She admitted that since 1932 her business had been run at a loss; and it is clear that on the date of this document the bankrupt was unable to meet her liabilities.

D Prior to 12th April, 1935, the respondent demanded repayment, and on that day he sent the bankrupt a notice requiring her to pay the \$5,000 due on the I.O.U. within 24 hours from receipt of the notice "otherwise action will be taken against you to take possession of the goods from your premises to recover the above money and any subsequent expenses that may be incurred in connection therewith."

E On 14th April, 1935, the respondent came to the bankrupt's premises and removed goods to the value of \$5,036. A document was prepared in Chinese, purporting to represent a sales receipt for the goods removed, as though the transaction had been a cash sale, and acknowledging payment by respondent of \$5,036. In fact, no money passed on this occasion, except the \$36.

F The bankrupt, in her evidence, stated that she knew the letter of the 15th January, 1934, was connected with her debt to the respondent and was security for it; and when she received the notice she thought she was bound by the letter, and that was why she delivered the goods to the respondent.

G On the 17th April, 1935, the bankrupt filed her petition in bankruptcy; and on the 26th April, 1935, she was adjudicated bankrupt.

H The question in this case is similar to that in the case of *Sime, Darby & Co., Ltd. v. Official Assignee of the Estate of Lee Pang Seng*, A.I.R. 1928 P.C. 77, viz.: Was the transfer of these goods to the respondent made "with a view of giving such creditor a preference over the other creditors" within section 46(i) of the F.M.S. Bankruptcy Enactment, 1912, and therefore to be deemed fraudulent and void as against the Official Assignee? As was stated in the above case:

I "The question to be determined is one of fact: Was the dominant motive actuating the debtor in making the transfer a desire to prefer the particular creditor or was it of a different character? As the solution of this question involves an inquiry into the state of a man's mind, and as it must very seldom be the case that there is direct evidence on the point, the decision generally depends on the inference properly to be drawn from the circumstances attending the transfer as established by the evidence."

There can be no doubt that the bankrupt, when she gave the respondent the letter on 15th January, 1934, was under the impression that it was some sort of legal security for the debt. Nor can there be any